IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
September 21, 2006 Session

IN RE THE ADOPTION OF J.K.W.

Appeal from the Chancery Court for Hamilton County
No. 05-A-050 W. Frank Brown, III, Chancellor

No. E2006-00906-COA-R3-PT - FILED JANUARY 23, 2007

The Legislature has specified a number of grounds upon which an individual's parental rights can be terminated. Among those grounds is the following:

> The parent has been confined in a correctional or detention facility of any type, by order of the court as a result of a criminal act, under a sentence of ten (10) or more years, and the child is under eight (8) years of age at the time the sentence is entered by the court.

T.C.A. § 36-1-113(g)(6) (2005). Pursuant to this provision, the trial court terminated the parental rights of C.J.B. ("Father") to his biological child, J.K.W. ("the child"). The court also held that there was evidence, of a clear and convincing nature, that termination is in the best interest of the child. At trial, Father challenged, among other things, the constitutionality of T.C.A. § 36-1-113(g)(6), claiming that the statute was not narrowly tailored to serve a compelling state interest and, therefore, does not pass the constitutional test of strict scrutiny. The trial court found the statute to be constitutional. Father's sole challenge on appeal is directed at this ruling. We conclude that T.C.A. § 36-1-113(g)(6) is narrowly tailored to serve a compelling state interest. Accordingly, we affirm the trial court's judgment.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed; Case Remanded

CHARLES D. SUSANO, JR., J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and SHARON G. LEE, J., joined.

Mattea L. Rolin, Chattanooga, Tennessee, for the appellant, C.J.B.

Paul G. Summers, Attorney General and Reporter, and Douglas Earl Dimond, Senior Counsel, Nashville, Tennessee, for the appellee, Tennessee Department of Children's Services.

Linda B. Hall, Soddy Daisy, Tennessee, for the appellees, J.W. and W.W.

OPINION

I.

The underlying facts in this case are not in dispute. The child, who was born on May 21, 2001, is the "product" of Father's unlawful sexual relationship with Father's 12-year old stepdaughter. Following this relationship, Father was charged with statutory rape in a two count indictment. On November 1, 2001, he pleaded guilty to two counts of attempted child rape, a Class B felony. He was sentenced to ten years in prison on each count, with the sentences to be served concurrently. The child was less than six months old when his biological father was convicted. Father has never seen the child.

In January, 2004, the child was placed in the protective custody of the Department of Children's Services ("DCS"). Shortly thereafter, he was placed in the care of J.W. and W.W. ("the Foster Parents"). When the child was originally placed with the Foster Parents, he was developmentally delayed to the extent that he could not speak. The Foster Parents are both teachers; the foster mother is a special education teacher. The child has improved dramatically in their care.

On July 6, 2005, the Foster Parents filed a petition to terminate Father's parental rights and to adopt the child. They named Father, the child's mother,[1] and DCS as defendants. The Foster Parents alleged the ground set forth in T.C.A. § 36-1-113(g)(6) as the sole basis for terminating Father's parental rights. The Foster Parents asserted that termination of Father's parental rights is in the child's best interest. A guardian *ad litem* was appointed for the child, and an attorney was appointed to represent the incarcerated Father.

DCS filed a response to the petition stating it was "in full agreement" with the petition and that it should be granted. Father responded to the petition, generally denying, or claiming a lack of knowledge as to, many of the petition's pertinent allegations. While Father admitted he was in prison serving a ten-year sentence, he denied that termination of his parental rights is in the child's best interest. Father later amended his answer to assert the following affirmative defense:

> That this Petition be denied on the grounds that *Tennessee Code Annotated* § 36-1-113(g)(6) is unconstitutional under the Tennessee State Constitution, in that it deprives the Respondent of this fundamental liberty interest in his parental relationship without due process of law.

[1] The mother voluntarily relinquished her parental rights.

Following a trial, the court below filed a memorandum opinion in which it set forth in detail its findings of fact and conclusions of law. The findings of fact include the following:

> [The child] was born on May 21, 2001;.…
>
> Legal custody of [the child] is with the State of Tennessee, Department of Children's Services;…
>
> [The Foster Parents] have had physical custody of [the child] since January 29, 2004;
>
> [The child] has some special needs, such as impaired language skills, developmental delays and extra emotional needs;
>
> [The foster mother, J.W.,] is a special education teacher and [the foster father, W.W.,] is a teacher … ;
>
> [The Foster Parents] are peculiarly educationally and professionally equipped to meet [the child's] special needs;
>
> [The Foster Parents] have a one-year old daughter whom they adopted;
>
> The two children in [the Foster Parents'] home have bonded;
>
> [The Foster parents] want to adopt [the child] and filed a Petition for Termination of Parental Rights and Adoption on July 6, 2005;
>
> The Tennessee Department of Children's Services approves and consents to the adoption [of the child by the Foster Parents];
>
> [The biological mother] has surrendered her parental rights … ;
>
> [Father] has never seen [the child];
>
> On November 1, 2001, [Father] pleaded guilty to two charges of attempted rape of a child;
>
> The Criminal Court for Hamilton County … sentenced [Father] to ten years with the Tennessee Department of Corrections for each charge of attempted rape of a child and the sentences were to run concurrent with each other;

> The Judgment in each case provided that [Father] "[m]ust register as a sex offender and get sex offender treatment per statutory guidelines";
>
> [The Foster Parents] contend that [Father] could not have [the child] live with him because [Father] is a sexual offender, and he committed the sexual act against a minor child. Tenn Code Ann. § 40-39-202 and § 40-39-211(c)(2);

(Paragraph numbering in original omitted). The trial court reached several conclusions of law. The court held that Father's prison sentence and the child's age brought them within the ambit of T.C.A. § 36-1-113(g)(6). The court stated that the facts of this case fall "squarely within the terms of Tenn. Code Ann. § 36-1-113(g)(6), unless that statutory provision is unconstitutional…." The court then discussed the public policy behind the statutory scheme authorizing the termination of parental rights and adoption of children in foster care. The court also discussed the safeguards in place to ensure that the rights of a biological parent are protected in the context of that statutory scheme. Finally, the court concluded that T.C.A. § 36-1-113(g)(6) is constitutional.

The court alluded to many of the above-quoted facts when it concluded that there was evidence showing, clearly and convincingly, that termination of Father's parental rights is in the child's best interest. The court then terminated Father's parental rights. This appeal followed.

II.

Father raises the following sole issue, which we quote verbatim from his brief:

> Whether or not the Trial Court incorrectly found that, because the termination of an individual's paternal [sic] rights involves a fundamental right, Tennessee Code Annotated, § 36-1-113(g)(6), is narrowly tailored to serve a compelling governmental interest and therefore is constitutional.[2]

[2] As can be seen, Father, on appeal, does not challenge the trial court's finding that the ground for terminating parental rights set forth in T.C.A. § 36-1-113(g)(6) has been proven in this case by clear and convincing evidence. Likewise, Father does not challenge the court's finding that there is evidence showing, clearly and convincingly, that termination of Father's parental rights is in the child's best interest. Suffice it to say, there is overwhelming evidence to support each of these conclusions.

III.

In ***Lynch v. City of Jellico***, 205 S.W.3d 384 (Tenn. 2006), the Supreme Court recently reiterated the applicable standard of review to be employed when a court is confronted with a facial attack on the constitutionality of a statute:

> This appeal involves questions of law only. Therefore, the standard of review is de novo without any presumption of correctness given to the legal conclusions of the trial court. *Taylor v. Fezell*, 158 S.W.3d 352, 357 (Tenn. 2005). Further, it is well-established in Tennessee that when considering the constitutionality of a statute, we start with a strong presumption that acts passed by the legislature are constitutional. *See Osborn v. Marr*, 127 S.W.3d 737, 740-41 (Tenn. 2004). Indeed, "we must indulge every presumption and resolve every doubt in favor of constitutionality." *Vogel v. Wells Fargo Guard Servs.*, 937 S.W.2d 856, 858 (Tenn. 1996). Therefore … we must begin our inquiry with the presumption that the statutes in question pass constitutional muster.
>
> Likewise, it is well recognized that a facial challenge to a statute, such as that involved here, is "the most difficult challenge to mount successfully since the challenger must establish that no set of circumstances exist under which the Act would be valid." *Davis-Kidd Booksellers, Inc. v. McWherter*, 866 S.W.2d 520, 525 (Tenn. 1993) (quoting *United States v. Salerno*, 481 U.S. 739, 745, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987)). Thus, the plaintiffs in this appeal have a heavy legal burden in challenging the constitutionality of the statutes in question.

Lynch, 205 S.W.3d at 390.[3]

IV.

"A biological parent's interest in the care, custody, and control of his or her child is among the oldest of the judicially recognized fundamental liberty interests." ***Ray v. Ray***, 83 S.W.3d 726, 731 (Tenn. Ct. App. 2001) (citing ***Troxel v. Granville***, 530 U.S. 57, 65, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000)). This fundamental right is protected by the Due Process Clause of the Fourteenth Amendment to the United States Constitution, ***Santosky v. Kramer***, 455 U.S. 745, 753, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982), and Article I, section 8 of the Tennessee Constitution, ***Blair v.***

[3] It is the practice of the author of this opinion to reflect case names in bold print and italics. However, when quoting from other cases – which (a) do not use bold print or (b) utilize underlining – the author refers to them as reported by West Publishing Company.

Badenhope, 77 S.W.3d 137, 141 (Tenn. 2002). However, we noted in ***In re S.M.***, 149 S.W.3d 632 (Tenn. Ct. App. 2004) that,

> [w]hile this right is fundamental and superior to the claims of other persons and the government, it is not absolute. It continues without interruption only as long as a parent has not relinquished it, abandoned it, or engaged in conduct requiring its limitation or termination. *Blair v. Badenhope*, 77 S.W.3d 137, 141 (Tenn. 2002); *Stokes v. Arnold*, 27 S.W.3d 516, 520 (Tenn. Ct. App. 2000); *O'Daniel v. Messier*, 905 S.W.2d 182, 186 (Tenn. Ct. App. 1995).

In re S.M., 149 S.W.3d at 638-39.

Positions similar or related to the one advocated by Father in the instant case have been advanced by parents in several cases that have resulted in appellate court decisions in this state. These decisions present, directly or indirectly, an interesting dialogue on the issue raised by Father. For this reason, we will examine them in some detail.

In the case of ***In re Adoption of E.N.R.***, 42 S.W.3d 26 (Tenn. 2001), the Supreme Court was confronted with a constitutional challenge to the validity of T.C.A. § 36-1-113(g)(6). As in the present case, ***E.N.R.*** involved a biological father who was in prison for at least ten years for having sex with a minor child. ***Id***. at 28. The Supreme Court ultimately concluded that the constitutional attack had not been timely raised and, accordingly, declined to address it. The Supreme Court stated it would not consider a constitutional attack raised for the first time on appeal "unless the statute involved is so obviously unconstitutional on its face as to obviate the necessity for any discussion." ***Id***. at 32-33 (quoting ***Lawrence v. Stanford***, 655 S.W.2d 927, 929 (Tenn. 1983)). The High Court went on to hold that T.C.A. § 36-1-113(g)(6) is not blatantly unconstitutional. ***Id***. at 33. Thus, in the present case, we know, at a minimum, that T.C.A. § 36-1-113(g)(6) is not "blatantly unconstitutional." Before we undertake to decide the issue left unresolved by ***E.N.R.***, we quote the following from the Supreme Court's opinion in that case:

> Section 36-1-113 is presumed to be constitutional. *See, e.g., In re Burson*, 909 S.W.2d 768, 775 (Tenn. 1995).… [The biological father], as challenger, bore the "heavy burden of overcoming that presumption." *See Helms v. Tenn. Dep't of Safety*, 987 S.W.2d 545, 550 (Tenn. 1999). The burden of proof and persuasion rests with him even though § 36-1-113 affects a fundamental right. *WRG Enters., Inc. v. Crowell*, 758 S.W.2d 214, 215-16 (Tenn. 1988); *see generally Hawk v. Hawk*, 855 S.W.2d 573 (Tenn. 1993).

E.N.R., 42 S.W.3d at 31.

Because the statutory scheme authorizing the termination of parental rights affects a fundamental liberty interest, the statute must pass the "strict scrutiny" standard. *See* ***Planned***

Parenthood of Tennessee v. Sundquist, 38 S.W.3d 1, 10-11 (Tenn. 2000). In order to survive a strict scrutiny analysis, the statute must serve a compelling state interest and be narrowly tailored to serve that interest. ***Id***. at 11 (citing ***San Antonio Indep. Sch. Dist. v. Rodriguez***, 411 U.S. 1, 29, 93 S. Ct. 1278, 1294, 36 L. Ed. 2d 16 (1973)). Tennessee courts have used the strict scrutiny approach in regard to fundamental rights "without exception." ***Id***. (citing ***State v. Smoky Mountain Secrets, Inc.***, 937 S.W.2d 905, 911 (Tenn. 1996)).

In ***Worley v. Dep't of Children's Servs.***, No. 03A01-9708-JV-00366, 1998 WL 52098 (Tenn. Ct. App. E.S., filed December 10, 1998), *no appl. perm. appeal filed*, the constitutionality of T.C.A. § 36-1-113(g)(6) was before the court. In ***Worley***, the biological father had been sentenced to 25 years in prison for second-degree murder. After the father's parental rights were terminated pursuant to T.C.A. § 36-1-113(g)(6), he appealed and challenged the constitutionality of the statute. We rejected that challenge:

> The Tennessee Supreme Court in *State Department of Human Services v. Smith*, 785 S.W.2d 336 (Tenn. 1990), in discussing the statutory scheme for termination of parental rights said at page 338:
>
> > In providing for the removal of custody and for the termination of parental rights the legislature has acknowledged competing interests - the child's need for a permanent, stable and safe environment and the parents' (and the child's) interest in the parent-child relationship - and have decided in favor of the former. In fact, the foster care sections of the statutes, which include termination provisions, are prefaced with a statement of purpose and construction which concludes, "if an early return to the care of their parents is not possible, [the child] will be placed in a permanent home at an early date." T.C.A. § 37-2-401(a). And, "[w]hen the interests of a child and those of an adult are in conflict, such conflict is to be resolved in favor of a child,…".
>
> The Smith Court went on to hold that if the circumstances that required the removal of the child to foster care cannot be changed and corrected, then the child's welfare requires termination of the parental rights so that the child may be placed in a stable and permanent home.
>
> The statute under attack bears a real and substantial relation to furthering the best interests of children, and such statutes permissibly afford greater protection to the minor's interest than to the rights of a parent. *See In re: R. G.*, 107 Misc.2d 900, 436 N.Y.S.2d 546 (1980).

> The legislature has expressed as a compelling state interest that minor children not remain permanently in foster care. T.C.A. § 36-1-113.
>
> The appellant, by his own acts, has severely diminished, if not nullified, his ability to discharge his role as a proper parent. When the parenting role is not or cannot be fulfilled, under the doctrine of *parens patriae* the State has a "special duty" to fulfill that role. *See [Hawk v. Hawk]*, 855 S.W.2d 573 at 580 (Tenn. 1993). The proper parental role in the life of a child under eight years is crucial to the child's welfare, and there is a compelling need for the State to protect the best interests of the child in this regard. The statute under consideration properly addresses and furthers that interest. For a parent who is unable or unwilling to care for the child's best interest, a statute that enables the State to terminate parental rights on these grounds does not violate the [due] process clause of the Constitutions. *See In re: B.*, 92 A.D.2d 917, 460 N.Y.S.2d 133 (1983).

Worley, 1998 WL 52098, at *1. ***Worley*** holds that the Legislature has expressed a compelling state interest that minor children not remain permanently in foster care. ***Worley*** further states that a *proper* parental role in the life of a child under eight years old is "crucial" to the child's welfare and there is "a compelling need for the State to protect the best interests of the child in this regard." ***Id.***, at *1. In the instant case, Father concedes that the State of Tennessee has a compelling interest in protecting the welfare of children and that this compelling state interest meets the first prong of the strict scrutiny test. We agree and hold, as we previously have, that T.C.A. § 36-1-113(g)(6) serves a compelling state interest.

We next turn to Father's primary argument on this appeal, *i.e.*, that T.C.A. § 36-1-113(g)(6) is not narrowly tailored to serve this acknowledged compelling state interest. As set forth previously in this opinion, this Court in ***Worley*** stated that T.C.A. § 36-1-113(g)(6) bore a "real and substantial relation to furthering the best interests of the children…." ***Id***., at *1. This conclusion was criticized by Judge William C. Koch, Jr., in his dissenting opinion in ***In re Adoption of a Female Child, E.N.R.***, No. 01A01-9806-CH-00316, 1999 WL 767795 (Tenn. Ct. App. M.S., filed September 29, 1999). Judge Koch stated that the Court in ***Worley*** used the wrong legal standard when it applied the lesser "real and substantial relationship test," as opposed to the more stringent "strict scrutiny test." 1999 WL 767795, at *12 n.13.

It is important to emphasize that the decision by the Middle Section of this Court in ***In re Adoption of a Female Child, E.N.R.*** was reviewed by the Supreme Court and resulted in a published opinion of the High Court. *See* 42 S.W.3d 26 (Tenn. 2001).[4] In ***E.N.R.***, T.C.A. § 36-1-113(g)(6) was challenged on the basis that it was not narrowly tailored to serving the state's compelling interest. The majority opinion of this Court in ***E.N.R.*** declined to address the constitutional issue

[4]Earlier in this opinion, we generally discussed this decision by the Supreme Court.

because it had not been timely raised. 1999 WL 767795, at *6. The entire opinion by the Supreme Court was devoted to the question of whether the constitutional issue had been waived. The Supreme Court concluded that it had and, consequently, declined to resolve the constitutional issue and affirmed this Court's majority opinion. ***In re Adoption of E.N.R.***, 42 S.W.3d 26, 34 (Tenn. 2001).

While a dissenting opinion may, at some point in the future, become the law, a dissent is not, in and of itself, controlling authority. However, it is Judge Koch's dissenting opinion in ***E.N.R.*** which forms virtually the entire basis for Father's constitutional challenge in the present case. Because the constitutional issue in the present case has been timely raised, we must discuss Father's arguments and, consequently, Judge Koch's dissenting opinion upon which Father's arguments are based.

Father relies upon the portion of Judge Koch's dissent in which he concluded that T.C.A. § 36-1-113(g)(6) was not narrowly tailored to serve the state's compelling interest. We quote from Judge Koch's dissent:

> It is constitutionally impermissible to sever a parent's connection with his or her child unless there has first been a finding that the continuation of the parent-child relationship threatens the child's welfare. *See In re Adoption of a Female Child (Bond v. McKenzie)*, 896 S.W.2d 546, 548 (Tenn. 1995); *Nale v. Robertson*, 871 S.W.2d at 680; *Hawk v. Hawk*, 855 S.W.2d at 582. Tennessee's newly minted adoption statutes contain a list of types of parental conduct that will trigger a termination proceeding. *See* Tenn. Code Ann. § 36-1-113(g). The necessary implication to be drawn from this list is that the General Assembly has concluded that the continuation of a child's relationship with a parent who commits any of the acts on the list ipso facto threatens the child's welfare. That rather sweeping conclusion may or may not be true depending on the facts of the case.
>
> * * *
>
> [The] particular ground for terminating parental rights [found at Tenn. Code Ann. § 36-1-113(g)(6)] was not part of Tennessee's law until 1995. Our statute is one of only six state statutes making a criminal conviction, by itself, grounds for triggering a termination proceeding.…
>
> Substantial questions exist concerning the constitutionality of statutes like Tenn. Code Ann. § 36-1-113(g)(6) that permit courts to terminate parental rights because of the status of the parent rather than because of the detrimental effect of the parent-child relationship on the child. Apart from the states' generalized interest in the welfare of children,

> these statutes, as a practical matter, have the effect of shifting the focus to the parent's conduct alone and away from an individualized identification of the states' particularized interests in severing a specific parent-child relationship. There are also substantial questions concerning the closeness of the fit between such a statute's means and its objectives because the use of per se triggering grounds in termination proceedings could very well result in cases where the child will actually be harmed by irretrievably severing his or her relationship with an otherwise fit incarcerated parent. If the fit between a statutory ground for termination on a parent's fitness cannot withstand close constitutional scrutiny, no amount of reliance on a child's best interests can save the statute.…
>
> Reliance on the best interest analysis required by Tenn. Code Ann. § 36-1-113(c)(2) to cure the problems created by Tenn. Code Ann. § 36-1-113(g)'s list of per se grounds is misplaced. I can find no reported or unreported case in which a trial or appellate court in this State has determined that a child's best interests would not be served by terminating a parent's rights after determining that statutory grounds for termination of a parent's rights have been proven by clear and convincing evidence. While academically possible, it is unrealistic to expect that a trial court, after finding that a parent has engaged in conduct that warrants the termination of his or her parental rights, will decline to terminate parental rights and leave the parent-child relationship intact.

In re Adoption of a Female Child, E.N.R., No. 01A01-9806-CH-00316, 1999 WL 767795, at *12-13 (Tenn. Ct. App. M.S., filed September 29, 1999)(Koch, J., dissenting)(footnotes omitted).[5] In short, Judge Koch believed that T.C.A. § 36-1-113(g)(6) was facially unconstitutional because it did not require a separate finding that "continuation of the parent-child relationship threatens the child's welfare."

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[5] We disagree with Judge Koch's thought expressed in the last sentence of the above quote. In ***Dep't of Children's Servs. v. K.L.K.***, No. E2003-2452-COA-R3-PT, 2004 WL 1496317 (Tenn. Ct. App. E.S., filed July 6, 2004), *no appl. perm. appeal filed*, the Eastern Section of this Court affirmed the trial court's conclusion that a ground existed for terminating the mother's parental rights. However, we also determined that the trial court erred when it concluded that termination of the mother's parental rights was shown, clearly and convincingly, to be in the child's best interest. In so doing, we stated that "[s]ince the best interest determination requires a separate analysis, the existence of grounds to terminate parental rights does not automatically mean that termination of parental rights is in the best interest of the child." 2004 WL 1496317, at *13. Since these are two separate issues involving related but different questions, we see no reason to suggest that, once a ground for termination is found to exist, there is no reason to believe a court will intellectually and honestly engage in the "best interest" analysis.

Following Judge Koch's dissent in ***E.N.R.***, the issue of whether there must be a separate finding that continuation of the parent-child relationship threatens the welfare of the child before parental rights can be terminated pursuant to T.C.A. § 36-1-113(g)(6) was addressed by the Western Section of this Court in the case of ***In re Marr***, No. M2001-02890-COA-R3-CV, 2003 WL 152640 (Tenn. Ct. App. W.S., filed January 23, 2003)[6], *vacated on other grounds sub nom.* ***Osborn v. Marr***, 127 S.W.3d 737 (Tenn. 2004). The father in ***In re Marr*** was serving a 16-year prison sentence for especially aggravated robbery. 2003 WL 152640, at *1. The mother, who was single at the time, eventually filed a petition to terminate the father's parental rights to the parties' one-year old child, who was born after the father had committed the robbery. ***Id***. On appeal, this Court, in an unanimous opinion, discussed the constitutionality of T.C.A. § 36-1-113(g)(6):

> [T]he focus of the termination statute is on whether the child can safely live with the parent and have his, that is, the child's, day-to-day needs met. ***D.G.B.***, 2002 Tenn. App. LEXIS 647, at *26-*27.… A parent who is incarcerated for a period of ten or more years when the child is eight years old or younger will be *completely* unavailable to care for the child for the majority of his childhood. For a child who is in foster care, failing to terminate the incarcerated parent's parental rights means that the child will spend his childhood in foster care, with no permanent home.
>
> In his dissent in ***E.N.R.***, Judge Koch questions the Legislature's "sweeping conclusion" that, in cases in which the statutory grounds have been established, substantial harm results from continuation of the parental relationship. Nevertheless, there can be no question that a child suffers substantial harm from having a parent who will not, or cannot, live with the child and care for the child's daily needs for most of his childhood. Thus, for a child whose parent is incarcerated for ten years or more when the child is young, there need be no further evidence that substantial harm results to the child from that parent's total inability to care for him.
>
> Despite the harm that results to a child from the parent being unavailable to care for him, in a given instance, that harm may be outweighed by the benefit to the child of continuing the parental relationship. Thus, the statute provides that, even if grounds are established, the trial court may determine that termination of the parental relationship is not in the child's "best interests." Tenn. Code Ann. § 36-1-113(c)(2); ***see e.g., In Re: D.I.S.***, No. W2000-00061-COA-R3-CV, 2001 Tenn. App. LEXIS 358 (Tenn. Ct. App. May 17, 2001). This does not undermine the legislative scheme

[6] ***In re Marr*** was decided by the Western Section of this Court sitting at Nashville.

> under which an individualized finding of substantial harm is not necessary if grounds for termination are established by clear and convincing evidence. ***See*** Tenn. Code Ann. § 36-1-113(c). Under these circumstances, and in light of the heavy presumption that a statute enacted by the Legislature is constitutional, we conclude that, where grounds are established pursuant to section 36-1-113(g)(6), regarding incarceration of a parent, a separate finding of substantial harm is not constitutionally required.

In re Marr, 2003 WL 152640, at *12-13.

The Supreme Court granted permission to appeal in ***In re Marr*** and concluded that the mother in that case did not have standing to bring suit to terminate father's parental rights. ***Osborn v. Marr***, 127 S.W.3d 737, 741 (Tenn 2004). After finding that mother lacked standing, the Supreme Court concluded as follows:

> Accordingly, we dismiss this case and vacate the judgments of the courts below. Thus, we do not reach the merits of whether a separate showing of substantial harm to the child is constitutionally required when grounds for termination exist under Tennessee Code Annotated section 36-1-113(g)(6).

Marr, 127 S.W.3d at 741-42.

To summarize, after the Supreme Court's decision in ***Marr***, there were two competing positions on the constitutionality of T.C.A. § 36-1-113(g)(6). Because one of the two competing positions was set forth by Judge Koch in his dissent in ***E.N.R.***, and the other was set forth in a unanimous but ultimately vacated opinion by the Western Section of this Court in ***Marr***, neither pronouncement was controlling. However, the lack of any cases with precedential value came to an end with the release of this Court's opinion in the case of ***In re Audrey S.***, 182 S.W.3d 838 (Tenn. Ct. App. 2005), *app. dismissed Nov. 7, 2005*, a decision by the Middle Section of this Court authored by Judge Koch.[7] In ***In re Audrey S.***, the mother argued that T.C.A. § 36-1-113(g)(6) was unconstitutional because it did not require a separate finding that she was an unfit parent or that continuation of the parent/child relationship would pose a risk of substantial harm to the welfare of the child. Judge Koch's majority opinion concluded that the statute was constitutional, stating as follows:

> In every case in which parental rights are terminated, there must be a "finding by the court by clear and convincing evidence that the grounds for termination o[f] parental or guardianship rights have been

[7] Judge William B. Cain filed a separate concurring opinion discussing the standard of review in parental rights termination cases. 182 S.W.3d at 883. However, Judge Cain took no issue with the portion of Judge Koch's opinion addressing the constitutionality of T.C.A. § 36-1-113(g)(6). ***Id***. at 883-84.

established," Tenn. Code Ann. § 36-1-113(c)(1), and this finding must be contained in a written order entered by the trial court, Tenn. Code Ann. § 36-1-113(k). Thus, as long as the juvenile court has correctly found that at least one of the statutory grounds for termination of parental rights exists, the constitutional requirement of a showing of parental unfitness or a risk of substantial harm to the welfare of a child has been satisfied. In effect, the constitutional unfit parent/substantial harm analysis is subsumed within the analysis of whether the statutory grounds for termination have been properly established. A separate finding of parental unfitness or substantial harm, in addition to a finding of the existence of at least one of the statutory grounds, would be redundant.

In reaching this conclusion, the only thing that gives us pause is the Tennessee Supreme Court's decision to grant the Tenn. R. App. P. 11 application for permission to appeal in *In re Marr*, No. M2001-02890-COA-R3-CV, 2003 WL 152640 (Tenn. Ct. App. Jan. 23, 2003), *perm. app. granted* (Tenn. May 27, 2003), *app. dismissed sub nom. Osborn v. Marr*, 127 S.W.3d 737 (Tenn. Jan. 23, 2004). In that case, … [t]he mother appealed the trial court's refusal to terminate the father's parental rights. This court held, in conformity with our prior case law, that once a statutory ground for termination has been established, there is no constitutional requirement that the trial court make an additional finding of substantial harm. *In re Marr*, 2003 WL 152640, at *1, *13. We reversed the judgment of the trial court and remanded the case for a determination of whether termination of the father's parental rights was in the best interests of the child. *In re Marr*, 2003 WL 152640, at *13.

The Tennessee Supreme Court granted the father's Tenn. R. App. P. 11 application for permission to appeal to decide "whether Tennessee Code Annotated section 36-1-113(g)(6) … requires a showing of substantial harm to the child before a parent's rights may be terminated." *Osborn v. Marr*, 127 S.W.3d at 738. The court tacitly acknowledged that the termination statutes do not require a separate finding of substantial harm,[8] and that the issue is whether such an additional finding is constitutionally required. *Osborn v. Marr*, 127 S.W.3d at 738-39. Ultimately, the court did not reach this issue, because it concluded that the mother lacked statutory standing to file the termination petition. *Osborn v. Marr*, 127 S.W.3d at 741. As a

[8]This is not to say that the issue of "substantial harm" can never be a consideration in the "best interest" analysis. A finding of substantial harm or a lack thereof may well be a consideration in this latter analysis.

> result, the trial court did not have subject matter jurisdiction to hear the mother's termination petition. *Osborn v. Marr*, 127 S.W.3d at 741. Following its usual practice in cases where the trial court lacks subject matter jurisdiction, the court dismissed the case and vacated the judgments of both the trial court and this court. *Osborn v. Marr*, 127 S.W.3d at 741.
>
> It is possible to interpret the Tennessee Supreme Court's granting of the father's Tenn. R. App. P. 11 application in *In re Marr* and its subsequent decision to vacate this court's opinion as an indication that the Tennessee Supreme Court disagrees with this court's conclusion that a separate and express finding of substantial harm, over and above a finding of the existence of one or more statutory grounds for termination, is not constitutionally required in every order terminating parental rights. We do not interpret the court's actions in this manner. First, the court expressly stated that it was not reaching "the merits of whether a separate showing of substantial harm to the child is constitutionally required when grounds for termination exist under Tennessee Code Annotated section 36-1-113(g)(6)." *Osborn v. Marr*, 127 S.W.3d at 741-42. Second, the court has repeatedly declined to grant Tenn. R. App. P. 11 applications in other cases in which this court has reached the same conclusion. *White v. Moody*, 2004 WL 3044909, at *5, *perm. app. denied* (Mar. 21, 2005); *State Dep't of Children's Servs. v. C.S.M.*, 2002 WL 385870, at *6, *perm. app. denied* (Tenn. Sept. 16, 2002); *Ray v. Ray*, 83 S.W.3d at 732 n. 7, *perm. app. denied* (Tenn. July 15, 2002). Third, the court vacated this court's decision in conformance with its established procedure of dismissing a case and vacating the lower court opinions when it determines that the courts lack subject matter jurisdiction over the case. *Osborn v. Marr*, 127 S.W.3d at 741. Finally, much to the chagrin of many a litigant, the Tennessee Supreme Court's decision to grant a Tenn. R. App. P. 11 application for permission to appeal does not necessarily indicate that the court disagrees with the decision rendered by this court. *See, e.g., Staubach Retail Servs.-Southeast, LLC v. H.G. Hill Realty Co.*, 160 S.W.3d 521, 523 (Tenn. 2005); *Mills v. Wong*, 155 S.W.3d 916, 925 (Tenn. 2005).

In re Audrey S., 182 S.W.3d at 882-83 (footnote added). Thus, with ***In re Audrey S.***, there is precedential authority to the effect that T.C.A. § 36-1-113(g)(6) is not unconstitutional because of

its failure to expressly require a separate showing of substantial harm to the child.[9] It is now clear that Judge Koch's dissent in ***E.N.R.***, and Father's argument in the instant case based upon that dissent, have been repudiated by ***In re Audrey S***. This latter case is a complete answer to the constitutional challenge mounted by Father.

In light of the decision by the Middle Section of this Court in ***In Re Audrey S.***, 194 S.W.3d 490 (Tenn. Ct. App. 2005) and the decision by the Eastern Section in ***Worley v. Dep't of Children's Servs***., No. 03A01-9708-JV-00366, 1998 WL 52098 (Tenn. Ct. App. E.S., filed December 10, 1998), *no appl. perm. appeal filed*, we now have intermediate appellate court decisions holding that T.C.A. § 36-1-113(g)(6) is facially constitutional. Unless and until the Supreme Court instructs otherwise, we will follow these decisions. Therefore, we hold that T.C.A. § 36-1-113(g)(6) is not constitutionally deficient because of its failure to expressly require a separate finding that continuation of the parent-child relationship threatens the welfare of the child. We conclude that T.C.A. § 36-1-113(g)(6) is narrowly tailored to serve a compelling state interest.

V.

The judgment of the trial court is affirmed. This case is remanded to the trial court for enforcement of the trial court's judgment and for collection of costs assessed below, all pursuant to applicable law. Costs on appeal are taxed to the appellant, C.J.B.

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CHARLES D. SUSANO, JR., JUDGE

[9] We will return to ***Marr*** one last time. As mentioned several times above, the Supreme Court in ***Marr*** dismissed the case after concluding that the mother, who was single, did not have standing to bring a parental rights termination proceeding. ***Osborn v. Marr***, 127 S.W.3d 737, 741 (Tenn. 2004). While the appeal in that case was pending, the mother married Stuart Howlett and together they jointly filed a petition to terminate the father's parental rights. Stepparent adoptions are expressly authorized by the statute and prospective adoptive parents are expressly given standing to file parental termination proceedings. Thus, the mother and her new husband had standing. *See* ***In re Marr***, 194 S.W.3d 490, 495 at n.9 (Tenn. Ct. App. 2005) (citing T.C.A. §§ 36-1-115(c), 36-1-117(a)(1), and 36-1-113(b) (2005)). The second petition to terminate the father's parental rights was granted by the trial court and another appeal was filed by the father. In an opinion authored by Judge Koch, the termination of the father's parental rights was affirmed, although the constitutionality of T.C.A. § 36-1-113(g)(6) was not directly at issue on that appeal. ***Id***. at 500.